

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAUSTEVEION JOHNSON,

Plaintiff,

vs.

GAROFALO, *et al.*,

Defendants.

Case No.: 2:16-cv-01889-GMN-DJA

ORDER

Pending before the Court is the Partial Motion for Summary Judgment, (ECF No. 104), filed by pro se Plaintiff Lausteveion Johnson (“Plaintiff”).¹ Defendants Connie Bisbee, Board of Parole Commissioner, Darla Foley, Michael Keeler, Lucille Monterde (collectively, “Parole Board Defendants”) filed a Response, (ECF No. 113). Defendants Catherine Cortez Masto, James Cox, James Dzurenda, Micaela Garofalo, Adam Laxalt, Offender Management Division, Office of the Attorney General, Brian Sandoval, Howard Skolnik, Brian Williams, and Gregory Yates (collectively, “NDOC Defendants”), filed a Joinder, (ECF No. 116), to the Response. Plaintiff did not file a reply.

Also pending before the Court is Parole Board Defendants’ Countermotion for Summary Judgment, (ECF No. 114). NDOC Defendants, filed a Joinder, (ECF No. 117). Plaintiff filed a Response, (ECF No. 124), to the Motion for Summary Judgment. Parole Board Defendants filed a Reply, (ECF No. 127), and NDOC Defendants filed a Joinder, (ECF No. 129), to the Reply.

¹ In light of Plaintiff’s status as a pro se litigant, the Court has liberally construed his filings, holding them to standards less stringent than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

1 Also pending before the Court is Plaintiff's Motion for Oral Arguments on Dispositive
2 Motion, (ECF No. 130). Defendants filed non-oppositions, (ECF Nos. 131, 132). Plaintiff
3 filed a Reply, (ECF No. 133).

4 Also pending before the Court is the Motion for Summary Judgment, (ECF Nos. 135),
5 filed by NDOC Defendants.² Parole Board Defendants filed a Joinder, (ECF No. 143).
6 Plaintiff filed a Response, (ECF No. 146), and NDOC Defendants filed a Reply, (ECF No.
7 149).

8 Also pending before the Court are Plaintiff's Partial Motions to Strike Defendant's
9 Motion for Summary Judgment, (ECF Nos. 144, 148). NDOC Defendants filed Responses,
10 (ECF Nos. 147, 151). Plaintiff did not file a reply.

11 Also pending before the Court are Plaintiff's Motions for Status Check, (ECF Nos. 150,
12 181).

13 **I. BACKGROUND**

14 Plaintiff is a prisoner in the custody of the Nevada Department of Corrections (NDOC)
15 and currently housed at Southern Desert Correctional Center. (Pl.'s Notice of Change of
16 Address, ECF No. 180); (*see also* NDOC Defs.' Mot. Summ. J. 2:3–4 ("NDOC MSJ"),
17 ECF No. 135).

18 In 2004, Plaintiff was convicted of sexual assault pursuant to Nevada Revised Statutes
19 ("NRS") 200.364 and 200.366, and sentenced to life with the possibility of parole after ten
20 years. (First Am. Compl. ("FAC") at 9, ECF No. 11). The sentencing court additionally issued
21 Plaintiff a consecutive sentence of eight to twenty years for attempted sexual assault with use of
22 a deadly weapon in violation of NRS 193.330 and 193.165. (*Id.*); (Pl.'s Mot. Partial Summ. J.
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² NDOC Defendants also filed Sealed Unredacted Exhibits in Support of the Motion for Summary Judgment, (ECF No. 137), and an Errata to the Motion for Summary Judgment, (ECF No. 142).

1 (“Pl.’s MSJ”) at 3, ECF No. 104). Plaintiff was nineteen years old when he was charged, and
2 his victim was sixteen-years-old. (FAC at 9).

3 Plaintiff’s first parole hearing occurred on February 20, 2013. (2013 Parole Bd. Order
4 and Risk Assessment, Ex. D to Pl.’s MSJ, ECF No. 104). The Parole Board denied Plaintiff
5 parole, stating the following reasons for denial: repetitive criminal conduct, nature of the
6 criminal record is increasingly more serious, and impact to victim and/or community. (*See id.*).
7 The Order initially noted that Plaintiff’s victim was 13 years old at the time of the offense, but
8 was corrected to indicate that the victim was 16 years old. (Oct. 10, 2013 Parole
9 Commissioners Board Letter, Ex. I to Pl.’s MSJ, ECF No. 104); (Corrected 2013 Parole Risk
10 Assessment, Ex. E to Pl.’s MSJ, ECF No. 104). However, the decision of the Parole Board
11 denying Plaintiff parole remained unchanged. (*Id.*).

12 Plaintiff’s second parole hearing occurred on March 16, 2016. (2016 Parole Order and
13 Risk Assessment, Ex. F to Pl.’s MSJ, ECF No. 104). The Parole Board denied Plaintiff parole,
14 stating the following reasons for denial: prior conviction for a sexual offense (which was
15 crossed out), prior conviction for a violent offense (robbery), repetitive criminal conduct, nature
16 of the criminal record is increasingly more serious, impact to victim and/or community, and
17 crime was targeted against a child. (*See id.*). The Board further noted that the “[v]ictim was
18 sexually assaulted by the inmate on two separate occasions, once a knife point, threatened to
19 kill her, feared for life. Inmate broke into victim’s residence” (*Id.*). The Order also noted that
20 the victim was under 14 years old at the time of the offense. (*Id.*).

21 Plaintiff appealed requesting a new parole hearing. The Parole Board issued a corrected
22 order removing the prior conviction for a sexual offense, removing the “nature of the criminal
23 record is increasingly more serious” aggravating factor, and changing the victim’s age to 16.
24 (Corrected 2016 Parole Order, Ex. 7 to Mot. Dismiss, ECF No. 47-7). However, the decision
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1 of the Parole Board to deny Plaintiff parole remained unchanged and a new hearing was denied.
2 (*See id.*).

3 On October 24, 2016, Plaintiff filed his Amended Complaint seeking monetary damages
4 and injunctive relief. (FAC at 32, 37). On June 10, 2017, the Court issued its Screening Order,
5 (ECF No. 16), indicating the following claims survived: (1) a retaliation claim against
6 Defendants Brian Williams, Micaela Garofalo, Yates, the Office of the Attorney General,
7 Skolnik, Laxalt, the Offender Management Division, and Sandoval; (2) an equal protection
8 claim against Defendants Garofalo, Williams, Monterde, Dzurenda, Board of Parole
9 Commissioners, Yates, Foley, Keeler, and Las Vegas Metropolitan Police Department
10 (LVMPD)³; (3) a due process claim against Defendants Keeler, Garofalo, Williams, Yates, the
11 Attorney General's Office, Masto, Dzurenda, the Board of Parole Commissioners, Bisbee,
12 Sandoval, Skolnik, Foley, Cox, Laxalt, the Offender Management Division, LVMPD, Keeler,
13 and Monterde; and (4) an ex post facto claim against Defendants Garofalo, Williams,
14 Monterde, Dzurenda, the Board of Parole Commissioners, Yates, Foley, Keeler, Sandoval,
15 Masto, and Bisbee. (Screening Order 9:6–10:28, ECF No. 16). On August 22, 2018, the Court
16 dismissed Plaintiff's claims against Parole Board Defendants with prejudice. (Order 17:7–9,
17 ECF No. 88).

18 Plaintiff's third parole hearing occurred on February 20, 2019. (2019 Parole Order and
19 Risk Assessment, Ex. 1 to Parole Board Defs.' MSJ, ECF No. 114-1). The Parole Board
20 granted Plaintiff parole to his consecutive sentence. (*Id.*). Plaintiff's "effective parole date"
21 was May 1, 2019. (*Id.*).

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25 ³ Plaintiff's claims against LVMPD were later dismissed without prejudice for failure to effect timely service in
accordance with Federal Rule of Civil Procedure 4(m). (Order, ECF No. 86).

1 On February 25, 2019, the Court granted in part and denied in part Plaintiff's Motion to
2 Alter or Amend Order, (ECF No. 93).⁴ In the Order, the Court indicated that

3 Plaintiff's due process claim is based, in part, on allegations that the Parole Board
4 Defendants applied improper procedures and inapplicable aggravating factors
5 during Plaintiff's parole board hearings. . . . These allegations align with the
6 Nevada Supreme Court's holding in *Anselmo v. Bisbee*, and thus may serve as a
viable basis for a due process claim due to alleged application of inapplicable
aggravating factors during consideration of parole.⁵

7 (Order 5:17–25, ECF No. 103). The Court also reaffirmed its earlier ruling that Parole Board
8 Defendants are “absolutely immune from Plaintiff's due process claim to the extent that
9 Plaintiff seeks monetary damages.” (*Id.* 6:7–10). However, the Court found that “absolute
10 immunity does not extend to injunctive relief against the Parole Board Defendants.” (*Id.*)
11 (citing *Thornton v. Brown*, 757 F.3d 834, 840 (9th Cir. 2013); *Tripp v. Bisbee*, 670 F. App'x
12 494, 495 (9th Cir. 2016)).

13 Plaintiff, Parole Board Defendants, and NDOC Defendants subsequently filed summary
14 judgment motions, (ECF Nos. 104, 114, 135).⁶ Additionally, Plaintiff filed several motions
15 seeking various forms of relief, (ECF Nos. 121, 130, 144, 148, 150, 181). This Order now
16 follows.

17 **II. LEGAL STANDARD**

18 The Federal Rules of Civil Procedure provide for summary adjudication when the
19 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
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21 ⁴ The Court construed Plaintiff's Motion to Alter or Amend Order, (ECF No. 93), as a motion for
22 reconsideration.

23 ⁵ Plaintiff's Motion to Alter or Amend Order, (ECF No. 93), only addressed Plaintiff's 2013 and 2016 parole
24 hearings. Plaintiff's 2019 parole hearing took place months after Plaintiff's Motion, (ECF No. 93), was fully
briefed. As such, the Court's February 25, 2019 Order, (ECF No. 103), did not consider Plaintiff's 2019 parole
hearing.

25 ⁶ “Plaintiff moves Partial Motion for Summary Judgment only addressing violations related to his Parole.” (Pl.'s
MSJ at 2. Thus, it is the Court's understanding that Plaintiff does not move for summary judgment on his First
Amendment retaliation claim, to the extent it relates to Plaintiff's visitation with his son, or on his equal
protection claim.

1 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
2 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
3 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
4 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
5 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
6 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
7 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
8 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
9 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
10 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

11 In determining summary judgment, a court applies a burden-shifting analysis. “When
12 the party moving for summary judgment would bear the burden of proof at trial, it must come
13 forward with evidence which would entitle it to a directed verdict if the evidence went
14 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
15 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
16 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
17 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
18 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
19 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
20 party failed to make a showing sufficient to establish an element essential to that party’s case
21 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
22 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
23 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
24 398 U.S. 144, 159–60 (1970).

1 If the moving party satisfies its initial burden, the burden then shifts to the opposing
2 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
3 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
4 the opposing party need not establish a material issue of fact conclusively in its favor. It is
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
7 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
8 summary judgment by relying solely on conclusory allegations that are unsupported by factual
9 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
10 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
11 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.
12 At summary judgment, a court’s function is not to weigh the evidence and determine the truth
13 but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The
14 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in
15 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
16 significantly probative, summary judgment may be granted. *See id.* at 249–50.

17 **III. DISCUSSION**

18 **A. Civil Rights Claims Under 42 U.S.C. § 1983**

19 Section 1983 of Title 42 of the United States Code aims “to deter state actors from using
20 the badge of their authority to deprive individuals of their federally guaranteed rights.”
21 *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d
22 1135 1139 (9th Cir. 2000)). The statute “provides a federal cause of action against any person
23 who, acting under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*,
24 526 U.S. 286, 290 (1999), and therefore “serves as the procedural device for enforcing
25 substantive provisions of the Constitution and federal statutes.” *Crumpton v. Almy*, 947 F.2d

1 1418, 1420 (9th Cir. 1991). Claims under § 1983 require a plaintiff to allege (1) the violation
2 of a federally-protected right by (2) a person or official acting under the color of state law.
3 *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the plaintiff must establish
4 each of the elements required to prove an infringement of the underlying constitutional or
5 statutory right.

6 ***1. supervisory liability under § 1983***

7 “Liability under [§] 1983 arises only upon a showing of personal participation by the
8 defendant. A supervisor is only liable for the constitutional violations of . . . subordinates if the
9 supervisor participated in or directed the violations, or knew of the violations and failed to act
10 to prevent them. There is no respondeat superior liability under [§] 1983.” *Taylor v. List*, 880
11 F.2d 1040, 1045 (9th Cir. 1989) (citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662,
12 676 (2009) (“Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff
13 must plead that each Government-official defendant, through the official’s own individual
14 actions, has violated the Constitution.”); *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479
15 F.3d 1175, 1182 (9th Cir. 2007) (concluding that allegations that school officials knew of
16 alleged violation and failed to take corrective action were sufficient to state a claim); *Ortez v.*
17 *Washington Cty, Or.*, 88 F.3d 804, 809 (9th Cir. 1996) (concluding proper to dismiss where no
18 allegations of knowledge of or participation in alleged violation).

19 Here, Plaintiff contends that Defendants Skolnik, Dzuenda, and Laxalt are liable for
20 First Amendment, Due Process Clause, and Ex Post Facto Clause violations Plaintiff allegedly
21 suffered because Defendants Skolnik, Dzuenda, and Laxalt were “present at the 2012 Board of
22 Prison Commissioners meeting where it was brought to light that ‘NDOC Officials had been
23 placing false sexual assault charges in inmates’ files that is causing inmates parole to be
24 denied.’ . . . Yet they refuse to correct it [although] Plaintiff was directly [a]ffected by having
25 multiple false sexual assault charges placed in his Parole Board Reports in 2013 and 2016, that

1 caused his parole to be denied for 6 years[.]” (Pl.’s MSJ at 24–25). Plaintiff further maintains
2 that Defendants Dzuenda and Laxalt “created an atmosphere of false retaliatory parole reports
3 and directed as much against Plaintiff because [of] his multiple lawsuits against NDOC and the
4 parole board which were 19 in total.” (Pl.’s Resp to NDOC MSJ at 8, ECF No. 146).
5 Additionally, Plaintiff asserts that “former director Skolnik implemented the NOTIS system in
6 NDOC in 2012 that was causing inmates paroles to be denied.” (*Id.* at 17). To support these
7 allegations, Plaintiff merely provides the minutes of the 2012 Board of Prison Commissioners
8 meeting, which contain the names of certain government officials that were present during the
9 meeting. (2012 Prison Comm’rs Meeting Mins. at 1, Ex. A to Pl.’s MSJ, ECF No. 104).
10 However, the minutes do not show Defendants Skolnik, Dzuenda, or Laxalt as being present
11 during the meeting. (*See id.*). More importantly, the minutes do not show that Defendants
12 Skolnik, Dzuenda, and Laxalt participated in or directed the alleged violations of their
13 subordinates, or knew of the alleged violations and failed to act to prevent them. Accordingly,
14 because liability under § 1983 arises only upon a showing of personal participation by a
15 defendant, Defendants Skolnik, Dzuenda, and Laxalt are entitled to summary judgment as a
16 matter of law.

17 2. “*person*” under § 1983

18 A governmental agency that is an arm of the state is not a person for purposes of § 1983.
19 *See Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th
20 Cir. 2007); *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); *Hale v.*
21 *Arizona*, 993 F.2d 1387, 1398–99 (9th Cir. 1993) (en banc); *Hutchins v. Nevada Dep’t of Corr.*,
22 No. 3:10-cv-00369-LRH-RAM, 2010 WL 3724902, at *2 (D. Nev. Sept. 15, 2010); *cf. Durning*
23 *v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991) (explaining that agencies that are arms
24 of the state are entitled to the same immunity from suit as the state because “the state is the real,
25 substantial party in interest.”).

1 Here, Plaintiff has named the Office of the Attorney General and the Offender
2 Management Division (OMD) as defendants in this action. However, the Office of the
3 Attorney General and OMD are governmental agencies that are an arm of the state; and
4 therefore, they are not persons for purposes of § 1983.⁷ Accordingly, NDOC Defendants’
5 Motion for Summary Judgment is granted as to all claims asserted against the Office of the
6 Attorney General and OMD.

7 **B. First Amendment Retaliation**

8 “Prisoners have a First Amendment right to file grievances against prison officials and
9 be free from retaliation for doing so.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).
10 In the prison context, a claim for First Amendment retaliation under § 1983 must establish five
11 elements: “(1) an assertion that a state actor took some adverse action against an inmate (2)
12 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
13 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
14 legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005).

15 Here, Plaintiff argues NDOC Defendants violated Plaintiff’s First Amendment rights by
16 retaliating against him for filing grievances and lawsuits. (FAC at 28). In order to prevail on
17 his Motion for Summary Judgment, Plaintiff must establish the absence of a genuine issue of
18 fact on each issue material to his case. *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*,
19 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). A dispute regarding a material fact is
20 considered genuine “if the evidence is such that a reasonable jury could return a verdict for the
21 nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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25 ⁷ Further, the Court reaffirms its prior ruling that because “the Board of Parole Commissioners is an arm of the
state, it is immune from this suit pursuant to the Eleventh Amendment.” (Order, ECF No. 88) (citing *Franceschi*
v. Schwartz, 57 F.3d 828, 831 (9th Cir. 1995)).

1 ***1. Plaintiff's claim against Defendant Yates***

2 Regarding Defendant Yates, Plaintiff alleges “either Williams assisted Yates in creating
3 a false parole board report in 2016 or ordered Yates to create a false parole board report.” (Pl.’s
4 Resp. NDOC MSJ at 7). Plaintiff asserts that “Yates placed false information and false charges
5 of prior sexual assault, and . . . 3 false convictions of NRS 213.1255 out of retaliation for
6 Plaintiff’s grievances and lawsuits.” (*Id.* at 10).

7 Both NDOC Defendants and Plaintiff have produced the 2016 Parole Board Report
8 prepared by Defendant Yates. (2016 Parole Bd. Report, Ex. C to NDOC MSJ, ECF No. 137-2);
9 (*see also* Ex. 18 to Pl.’s Resp. NDOC MSJ, ECF No. 146-4) (same). The report does not show
10 prior charges for sexual assault, nor does it show three convictions under NRS 213.1255. (*See*
11 *generally id.*). Therefore, Plaintiff’s allegations of false charges and convictions in the report
12 are unfounded. Regarding “false information,” Plaintiff contends that Defendant Yates
13 incorrectly stated Plaintiff’s active gang membership status and incorrectly stated that
14 Plaintiff’s victim was 13 years old, when she was actually 16 years old.

15 In his declaration, Defendant Yates explains that as a case worker, one of his duties is to
16 prepare parole reports for inmates that are “scheduled to go in front of the parole board.” (Yates
17 Decl. ¶ 5, Ex. D to NDOC MSJ, ECF No. 135-4). In preparing a report, case workers are
18 permitted to rely on documents such as an inmate’s Presentence Investigation Report (“PSI”),
19 prior parole reports, and other documents. (*Id.* ¶ 8). Yates explains that in preparing Plaintiff’s
20 2016 Parole Board Report, he relied on Plaintiff’s PSI and Plaintiff’s prior parole report, which
21 was prepared in 2012 by non-party Tasheena Sandoval. (*Id.* ¶ 10). Both Plaintiff’s PSI and the
22 prior parole report are provided as exhibits to NDOC’s Motion for Summary Judgment. (2013
23 Parole Bd. Report, Ex. B to NDOC MSJ, ECF No. 137-1); (PSI, Ex. N to NDOC MSJ, ECF
24 No. 137-6). Indeed, Plaintiff’s prior parole board report incorrectly states that Plaintiff’s victim
25 was 13 years old at the time of the offense. (2013 Parole Bd. Report at 1). Additionally,

1 Plaintiff's PSI states that Plaintiff "is a self-admitted member of the GPK street gang[.]" (PSI at
2 4). Moreover, Defendant Yates asserts that he "did not speak to or receive any direction from
3 either Defendant Micaela Garofalo or Defendant Brian Williams in the preparation of Plaintiff
4 Johnson's Parole report." (Yates Decl. ¶ 17). As such, NDOC Defendants have provided
5 evidence showing the 2016 Parole Board Report did not contain false charges and convictions,
6 and that Defendant Yates did not have a retaliatory motive when preparing Plaintiff's Parole
7 Board Report. Rather, Yates relied on Plaintiff's prior parole board report and PSI. On the
8 other hand, Plaintiff has only provided his bare assertions of retaliatory conduct in support of
9 this claim. Accordingly, summary judgment is granted in favor of NDOC Defendants
10 regarding Plaintiff's retaliation claim against Defendant Yates.

11 **2. Plaintiff's claim against Defendant Garofalo**

12 Regarding Defendant Garofalo, Plaintiff alleges that, at the direction of Defendant
13 Williams or Yates, Defendant Garofalo improperly classified Plaintiff as "high risk to re-
14 offend" in retaliation for filing grievances or lawsuits, and that this led to the denial of his
15 parole in 2016. (FAC at 10–11).

16 In her declaration, Defendant Garofalo explains that she is a psychologist for NDOC and
17 she is "often tasked with the preparation of Static-99R reports." (Garofalo Decl. ¶¶ 3, 6, Ex. E
18 to NDOC MSJ, ECF No. 135-5). "A Static-99R report is an assessment that determines the risk
19 of an offender's recidivism." (*Id.* ¶ 7). Garofalo asserts that psychologists do not need to meet
20 with an inmate in order to prepare his Static-99R report because "the analysis is based on
21 information surrounding the underlying offense of the inmate, which can be discovered with a
22 review of the [inmate's PSI]." (*Id.* ¶ 8). Garofalo further indicates that in 2016 she prepared a
23 Static-99R report for Plaintiff; that she did not meet with him to prepare the report; and that she
24 relied on Plaintiff's PSI. (*Id.* ¶¶ 9–11). Additionally, Garofalo states that Plaintiff received a
25 score of 7 and that the "high-risk" category is applied with a score of 6 or above. (*Id.* ¶¶ 12–

1 136). Furthermore, Garofalo declares: “I did not speak to Defendant Gregory Yates or
2 Defendant Brian Williams in in the preparation of the Static-99R form. Neither Defendant
3 Gregory Yates nor Defendant Brian Williams directed me in the preparation of the [risk
4 assessment] Static-99R form.” (*Id.* ¶¶ 14–15); (*see also* Williams Decl. ¶¶ 18–19) (Williams
5 declaring that he did not assist or direct Garofalo in the preparation of Plaintiff’s Static-99R
6 form).

7 NDOC Defendants move for summary judgment arguing that the Static-99R risk
8 assessment report does not take into account the age of an inmate’s victim and does not rely on
9 any particular NRS statute of conviction. As proof, NDOC Defendants provide the Static-99R
10 report Defendant Garofalo prepared for Plaintiff which indeed shows that Plaintiff obtained a
11 score of 7 and that 6 or higher places an inmate in the “high-risk” category. (Static-99R
12 Assessment, Ex. F to NDOC MSJ, ECF No. 137-3). Moreover, the Static-99R report does not
13 inquire as to the age of Plaintiff’s victim nor does it state that Plaintiff was convicted for a
14 violation of NRS 213.1255. (*Id.*). In fact, no NRS statute is referenced in the document. (*See*
15 *id.*).

16 In sum, Plaintiff has failed to provide evidence supporting his retaliation claim against
17 Defendant Garofalo. NDOC Defendants, on the other hand, have shown Plaintiff “cannot
18 support a claim of retaliation against Garofalo as [Plaintiff] cannot provide any evidence to
19 support his allegation that Garofalo classified [Plaintiff] as ‘high risk to re-offend’ based on the
20 fabrication that Johnson was convicted under NRS § 213.1255. [Plaintiff] therefore cannot
21 support the allegation that Garofalo did so because of any protected conduct.” (NDOC MSJ
22 26:19–27:2). As such, Plaintiff’s Motion is denied as to this claim. NDOC Defendants’
23 Motion for Summary Judgment is granted as to Plaintiff’s retaliation claim against Defendant
24 Garofalo.

25 **3. *Plaintiff’s claims against Defendant Williams***

1 Plaintiff sets forth two retaliation claims against Defendant Williams. In Plaintiff's first
2 claim, Plaintiff asserts that in December 2015 and January 2016, Williams called Plaintiff out
3 of his cell at SDCC to go to the Education Building. (Pl.'s MSJ at 7). In his declaration,
4 Plaintiff states:

5 these meeting[s] is where Brian Williams threatened to retaliate against me by
6 interfering with my upcoming parole hearing if I did not [stop] filing grievances
7 by stating that, . . . "if you keep filing grievances, I will jeopardize your release
8 from prison." Williams then let Plaintiff know that he was aware of the lawsuits
9 [Plaintiff had filed]. But I did not stop filing grievances.

10 (Pl.'s Decl. at 6, Ex. 48 to Pl.'s Resp. NDOC MSJ, ECF No. 146-7). As discussed above,
11 Plaintiff alleges that Williams then directed Defendant Garofalo to conduct a "false risk
12 assessment" classifying Plaintiff as "high risk to re-offend" and that "either Williams assisted
13 Yates in creating a false parole board report in 2016 or ordered Yates to create a false parole
14 board report." (Pl.'s Resp. NDOC MSJ at 5, 7). However, for the reasons provided Parts B.1
15 and B.2 *supra*, Plaintiff has not shown that Yates and Garofalo's respective reports were based
16 on false charges or convictions, or that Yates and Garofalo acted in retaliation against Plaintiff
17 for filing lawsuits and grievances. Still, Plaintiff submits that the chronology of events shows
18 retaliation; that Defendants' actions including Williams's actions, would have chilled a person
19 of ordinary firmness from continuing to file lawsuits and grievances; and that making Plaintiff
20 "a false high risk," and placing false information and false charges in his Parole Board Report
21 "didn't advance any legitimate goals of the correctional institution." (Pl.'s Resp. NDOC MSJ at
22 11-12).

23 In order to prevail on his Motion for Summary Judgment, Plaintiff must establish the
24 absence of a genuine issue of fact on each issue material to his case. *C.A.R. Transp. Brokerage*
25 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). A dispute
regarding a material fact is considered genuine "if the evidence is such that a reasonable jury

1 could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
2 248 (1986).

3 Regarding the first element of a retaliation claim—an assertion that a state actor took
4 some adverse action against an inmate—Plaintiff has indeed asserted that Defendant Williams,
5 a state actor, took some adverse action against Plaintiff. While Plaintiff maintains that the
6 adverse action taken by Defendant Williams was assisting or directing Garofalo and Yates in
7 producing incorrect reports, which subsequently led Plaintiff’s parole to be denied, Plaintiff has
8 not produced evidence either showing Williams actually assisted or directed Garofalo and
9 Yates or that Garofalo and Yates carried out Williams’s alleged instructions. Accordingly,
10 Plaintiff has not shown an absence of a genuine issue of material fact regarding Williams
11 assisting or directing Garofalo and Yates in producing incorrect reports.

12 Nevertheless, Plaintiff has asserted that Williams threatened Plaintiff by telling Plaintiff
13 that if he did not stop filing lawsuit and grievances, then Williams would jeopardize Plaintiff’s
14 parole. (Pl.’s Decl. at 6). Indeed, “the mere *threat* of harm can be an adverse action, regardless
15 of whether it is carried out because the threat itself can have a chilling effect [on First
16 Amendment rights].” *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009); *Watison v. Carter*,
17 668 F.3d 1108, 1114 (9th Cir. 2012); *see also Burgess v. Moore*, 39 F.3d 216, 218 (8th Cir.
18 1994) (“[A] threat of retaliation is sufficient injury if made in retaliation for an inmate’s use of
19 prison grievance procedures.”). Plaintiff’s declaration provides that “Williams threatened to
20 retaliate against [Plaintiff] by interfering with [his] upcoming parole hearing if [he] did not
21 [stop] filing grievances[.]” (Pl.’s Decl. at 6). Therefore, because Plaintiff need not show that
22 the threat was carried out, Plaintiff’s declaration establishes Williams threatened to interfere
23 with Plaintiff’s parole hearing, because of Plaintiff’s protected conduct (filing grievances and
24 lawsuits), and that said action chilled Plaintiff’s First Amendment rights. Notably, while
25 Defendant Williams asserts in his declaration that he did not direct or assist Defendants Yates

1 and Garofalo in the preparation of Plaintiff's 2016 Parole Report or the Static-99R risk
2 assessment, (Williams Decl. ¶¶ 16–19), Williams does not deny that he made threatening
3 retaliatory statements to Plaintiff in December 2015 and January 2016. Thus, there is no
4 genuine dispute as to these material facts. *See Anthoine v. N. Cent. Counties Consortium*, 605
5 F.3d 740, 745 (9th Cir. 2010) (providing that undisputed facts are taken as true for purposes of
6 a motion for summary judgment).

7 Notwithstanding the above, the Court cannot grant summary judgment in Plaintiff's
8 favor because a genuine dispute of material fact exists as to the fifth element of Plaintiff's
9 retaliation claim against Defendant Williams—that Williams's "action did not reasonably
10 advance a legitimate correctional goal." In the Ninth Circuit, "a successful retaliation claim
11 requires a finding that 'the prison authorities' retaliatory action did not advance legitimate goals
12 of the correctional institution or was not tailored narrowly enough to achieve such goals.'" *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (quoting *Rizzo v. Dawson*, 778 F.2d 527,
13 532) (9th Cir. 1985)). "The plaintiff bears the burden of pleading and proving the absence of
14 legitimate correctional goals for the conduct of which he complains." *Id.* Here, Plaintiff
15 summarily states that placing false information and false charges in his Parole Board Report
16 "didn't advance any legitimate goals of the correctional institution." (Pl.'s Resp. NDOC MSJ at
17 12). However, Plaintiff has failed to plead and prove that Williams's threats did not advance a
18 legitimate correctional goal. Thus, the Court cannot find that Plaintiff has carried his burden as
19 to this element. Accordingly, Plaintiff's Motion for Summary Judgment is denied as to this
20 retaliation claim against Williams. Moreover, for the foregoing reasons, NDOC Defendants
21 have not shown they are entitled to summary judgment on this claim, and therefore, their
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1 Motion is likewise denied. Thus, Plaintiff's claim for First Amendment retaliation will proceed
2 against Defendant Williams.⁸

3 In Plaintiff's second claim against Defendant Williams, Plaintiff alleges that on July 3,
4 2016, Williams and someone by the name of "Smith," a non-party to this suit, terminated
5 Plaintiff's visit with his son in retaliation for Plaintiff's lawsuits and grievances. (FAC at 17).
6 Plaintiff further alleges that Smith stated that Plaintiff's son was not on the approved visitors
7 list even though Plaintiff's son had visited ten times prior. (*Id.*).

8 Defendants move for summary judgment arguing that "Plaintiff has not provided any
9 evidence to support the allegation against non-party 'Smith' let alone any evidence to support
10 an allegation against Williams on the matter of preventing Johnson's son from visiting."
11 (NDOC MSJ 23:19–21). In his declaration, Defendant Williams indicates that he did not
12 interfere with Plaintiff's visitation list or terminate the visitation of Plaintiff's son with
13 Plaintiff. (Williams Decl. ¶¶ 21–22). NDOC Defendants provide, *inter alia*, Plaintiff's
14 visitation log through May 2017, which shows that Plaintiff's son "visited Johnson at least
15 twice in 2016, once on February 13, 2016, and then on May 25, 2016." (NDOC MSJ 8:23–26);
16 (Visitation Log, Ex. L to NDOC MSJ, ECF No. 137-4). NDOC Defendants do not explain how
17 the visitation log supports their Motion for Summary Judgment.

18 Plaintiff responds by submitting photos which he contends show he has a relationship
19 with his son. (Pl.'s Resp. NDOC MSJ at 12); (Exs. 32–43 to Pl.'s Resp. NDOC MSJ, 146-6).
20 Plaintiff further states that his son's mother would "testify at trial that not only did she bring
21 their son to visit Plaintiff multiple times, but she repeatedly signed notarized forms to allow
22

23 ⁸ NDOC Defendants argue that Defendant Williams is entitled to qualified immunity because Plaintiff "cannot
24 show a clearly established law that Williams allegedly violated." (NDOC MSJ 24:21–23). However, "the
25 prohibition against retaliatory punishment is 'clearly established law' in the Ninth Circuit, for qualified immunity
purposes." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (quoting *Schroeder v. McDonald*, 55 F.3d 454,
461 (9th Cir. 1995)); *see also Barnett v. Centoni*, 31 F.3d 813, 815–16 (9th Cir. 1994). Accordingly, the Court
finds that Defendant Williams is not entitled to qualified immunity.

1 Plaintiff's family and friends to bring Plaintiff's son to see him." (Pl.'s Resp. NDOC MSJ at
2 12).

3 The purpose of summary judgment "is to 'pierce the pleadings and to assess the proof in
4 order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (citation
5 omitted). Though Plaintiff submits that his son's mother would be willing to testify at trial,
6 summary judgment is the stage at which the Court assesses the proof in order to determine
7 whether a trial is necessary. Plaintiff does not state why he did not obtain a declaration or
8 affidavit from his son's mother in order to support his Response—and even if he had obtained a
9 declaration or affidavit, Plaintiff does not explain how his son's mother's testimony that she
10 brought "their son to visit Plaintiff multiple times" and "has repeatedly signed notarized forms
11 to allow Plaintiff's family and friends to bring Plaintiff's son to see him," would show that
12 Defendant Williams terminated Plaintiff's son's visit on July 3, 2016, in retaliation for
13 Plaintiff's grievances and lawsuits. Accordingly, summary judgment is granted in favor of
14 NDOC Defendants as to this retaliation claim.

15 **4. Plaintiff's claim against Defendant Sandoval**

16 As best the Court can discern, Plaintiff does not provide specific allegations regarding
17 Defendant Sandoval, but nevertheless contends that Sandoval and other NDOC Defendants
18 knew prior to Plaintiff's 2013 and 2016 parole hearings that prison officials were placing false
19 charges in parole reports, thereby causing the Parole Board to deny parole to inmates. (*See* FAC
20 at 18).

21 Plaintiff points out that Defendant Sandoval was at a 2012 Board of Prison
22 Commissioners Meeting. (2012 Prison Comm'rs Meeting Mins. at 1). The meeting's minutes
23 indicate that a person by the name of Tonya Brown asked Defendant Sandoval if he was "aware
24 of the computer glitch." (*Id.* at 2). According to Ms. Brown, a person by the name of Don
25 Helling had been deposed in a civil case, *Klein v. Helling*, and had testified about a computer

1 glitch. Ms. Brown went on to say that, “[t]he computer glitch on—in June 2007, flipped,
2 creating false felony charges in inmates’ files.” (*Id.* at 3). Further, Ms. Brown contended that
3 the glitch had “affected several other inmates. Inmates are getting sexual assault, murder,
4 attempted escape charges. It’s—the caseworkers are removing them, then they’re reappearing
5 and coming back.” (*Id.* at 3). It is entirely unclear whether Ms. Brown’s statements were her
6 own, whether she was quoting from Mr. Helling’s deposition, or whether she was quoting
7 someone else.

8 Solely relying on the minutes of the 2012 Board of Prison Commissioners meeting and
9 Ms. Brown’s statements regarding an alleged “computer glitch,” Plaintiff jumps to the
10 conclusion that “‘NDOC Officials [have] been placing false sexual assault charges in inmates’
11 files that is causing inmates parole to be denied.’ And that NDOC officials have been doing
12 this since 2007. Yet [Defendants] refuse to correct it [although] Plaintiff was directly [a]ffected
13 by having multiple false sexual assault charges placed in his Parole Board Reports in 2013 and
14 2016, that caused his parole to be denied for 6 years[.]” (Pl.’s MSJ at 24–25).

15 NDOC Defendants move for summary judgment arguing
16 Plaintiff has not provided any evidence to support any portion of this alleged
17 chain of events to include that there was even a computer glitch in the first place
18 or that it in any way affected Plaintiff’s parole hearing. Plaintiff’s allegation that
19 a computer glitch caused his parole report to show inaccurate information is not
20 even consistent with his own other allegation that the information was
21 deliberately altered out of retaliation by Defendants Williams and Yates.
22 (NDOC MSJ 22:11–16).

23 To satisfy the “retaliatory motive” element of a retaliation claim, a plaintiff must show
24 that his First Amendment activity was “the ‘substantial’ or ‘motivating’ factor behind the
25 defendant’s conduct.” *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (quoting
Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989)). The evidence
establishing such a motive is often circumstantial, *see id.*, but “mere speculation that defendants

1 acted out of retaliation is not sufficient.” *Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014).
2 Here, aside from Plaintiff’s bare assertions, Plaintiff only provides the minutes of the 2012
3 Board of Prison Commissioners meeting to support his claim against Defendant Sandoval.
4 However, the minutes do not prove that a “computer glitch” occurred, that Defendant Sandoval
5 knew of any incorrect information or charges in Plaintiff’s parole board reports as a result of
6 any glitch, or that Defendant Sandoval chose not to correct the discrepancies because of
7 Plaintiff’s grievances or lawsuits. Plaintiff’s mere speculation that there is a causal connection
8 is not enough to raise a genuine issue of material fact. *See Nelson v. Pima Cmty. Coll.*, 83 F.3d
9 1075, 1081–82 (9th Cir. 1996). Accordingly, summary judgment is granted in favor of NDOC
10 Defendants.

11 **C. Equal Protection Clause**

12 “The Equal Protection Clause of the Fourteenth Amendment commands that no State
13 shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is
14 essentially a direction that all persons similarly situated should be treated alike.” *Cleburne v.*
15 *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation omitted). Prisoners “are protected
16 under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination
17 based on race.” *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (citation omitted); *Walker v.*
18 *Gomez*, 370 F.3d 969, 973 (9th Cir. 2004). To establish a violation of the Equal Protection
19 Clause, the prisoner must present evidence of discriminatory intent. *See Washington v. Davis*,
20 426 U.S. 229, 239–40 (1976). “Intentional discrimination means that a defendant acted at least
21 in part because of a plaintiff’s protected status.” *Maynard v. City of San Jose*, 37 F.3d 1396,
22 1404 (9th Cir. 1994) (emphasis in original) (citation omitted). “Where the challenged
23 governmental policy is ‘facially neutral,’ proof of its disproportionate impact on an identifiable
24 group can satisfy the intent requirement only if it tends to show that some invidious or
25 discriminatory purpose underlies the policy.” *Lee v. City of Los Angeles*, 250 F.3d 668, 686

1 (9th Cir. 2001) (citing *Village of Arlington Heights v. Metro., Hous. Dev. Corp.*, 429 U.S. 252,
2 264–66 (1977)).

3 Here, Plaintiff premises his equal protection claim on the assertion that white inmates
4 with a single sexual assault conviction were given moderate risk to re-offend levels instead of
5 the high risk to re-offend that he received. (FAC at 26). Plaintiff further alleges that NDOC
6 Defendants removed gang affiliation designations for white inmates when they were no longer
7 a part of a gang. (*Id.*). Moreover, Plaintiff asserts that Parole Board Defendants converted
8 sexual assault sentences for black inmates to life without parole but failed to do so for white
9 inmates. (*Id.* at 25, 27).

10 Defendants move for summary judgment arguing that Plaintiff

11 has offered no support for his assertions that NDOC Defendants converted sexual
12 assault sentences for black inmates to life without parole but did not do so for
13 white inmates, kept white inmates convicted of the same crime as Plaintiff at a
14 moderate risk to re-offend level, and fabricated crimes and prior felony
15 convictions. Nor did he provide any support for the supposition that nearly all
16 white inmates that engage in rehabilitative programs are granted parole or that
17 there is a disparity between different racial groups being paroled pursuant to
18 NRS 200.366.

19 (NDOC MSJ 19:22–20:4). The Court agrees. Although Plaintiff has had the opportunity to
20 conduct discovery in this case, Plaintiff has not presented any evidence on summary judgment
21 that NDOC Defendants engaged in discriminatory conduct or had discriminatory intent. As
22 such, Plaintiff has failed to make a showing sufficient to establish any element essential to
23 Plaintiff's claim. *See Celotex Corp.*, 477 U.S. at 323–24. Accordingly, NDOC Defendant's
24 Motion for Summary Judgment is granted as to Plaintiff's equal protection claim.

25 **D. Due Process Clause**

To prevail on a Fourteenth Amendment procedural due process claim, a plaintiff must
show that he was denied a specified liberty interest and that he was deprived of that liberty

1 interest without the constitutionally required procedures. *Swarthout v. Cooke*, 562 U.S. 216,
2 219 (2011). “A liberty interest may arise from either of two sources: the due process clause
3 itself or state law.” *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2009) (quoting *Toussaint v.*
4 *McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986)). The guarantees of the Fourteenth
5 Amendment apply only when a constitutionally protected life, liberty, or property interest is at
6 stake. *See Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003); *Nunez v. City of Los Angeles*,
7 147 F.3d 867, 871 (9th Cir. 1998). Prisoners, however, have “no constitutional or inherent
8 right” to parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

9 Nevada state prisoners do not have a liberty interest in the discretionary grant of parole
10 or in eligibility for such parole. *See Moor v. Palmer*, 603 F.3d 658, 661–62 (9th Cir. 2010);
11 *Fernandez v. Nevada*, No. 3:06-cv-00628-LRH-RAM, 2009 WL 700662, at *10 (D. Nev. Mar.
12 13, 2009). However, in *Anselmo v. Bisbee*, 396 P.3d 848 (Nev. 2017), the Nevada Supreme
13 Court held that “eligible Nevada inmates have a statutory right to be considered for parole by
14 the [Parole] Board,” and that an inmate does not receive “proper consideration when the Parole
15 Board’s decision is based in part on an inapplicable aggravating factor.” *Id.* at 853.

16 Here, Plaintiff contends that, as an eligible Nevada inmate, his right to be considered for
17 parole was infringed because the Parole Board considered “false” information and improperly
18 applied aggravating factors during Plaintiff’s parole hearings in 2013 and 2016. (*See* FAC at
19 20–22). More specifically, Plaintiff alleges that Parole Defendants and NDOC Defendants “are
20 all co-conspirators” and fabricated “false parole reports” containing false charges, thereby
21 basing Plaintiff’s 2013 and 2016 parole hearings on false charges of which he was never
22 accused or convicted. (*See id.* at 20). Plaintiff further contends that Defendants “falsified the
23 Parole Board Order by stating that he had prior violent convictions, that he had sexually
24 assaulted a child under the age of 14 twice, that he had prior sexual assault convictions, [and
25 that] the his crimes were increasingly more serious, all of which are false.” (*Id.*). In addition,

1 Plaintiff submits that Defendants violated the Fourteenth Amendment by “making Plaintiff a
2 ‘high risk to re-offend’ . . . based upon . . . crimes that he was not accused nor convicted of.”
3 (FAC at 21).

4 ***1. Plaintiff’s claim against NDOC Defendants***

5 Plaintiff argues that Parole Board Defendants improperly denied his parole based on
6 incorrect information presented to them by certain NDOC Defendants—specifically,
7 Defendants Williams, Yates, and Garofalo. (*See* FAC at 20–22); (Screening Order at 4).
8 However, for the reasons provided in Part B.1–B3 *supra*, Plaintiff has not shown that these
9 NDOC Defendants added false charges or convictions to Plaintiff’s 2016 Parole Board Report
10 or that Plaintiff’s Static-99R risk assessment was based on false charges or convictions. It is
11 true that Plaintiff’s 2016 Parole Board Report incorrectly indicated that Plaintiff’s sexual
12 assault victim was 13 years old at the time of the offense. (2016 Parole Board Report at 1, Ex.
13 18 to Pl.’s Resp. NDOC MSJ, ECF No. 146-4). But despite Plaintiff’s arguments to the
14 contrary, the victim’s age did not cause Plaintiff to be considered for parole based on more
15 severe charges than the crimes for which he was actually sentenced. Indeed, the 2016 Parole
16 Board Report does not reflect any convictions for sexual assault of a child under the age of 14.
17 (*Id.*). Thus, Plaintiff has not shown that Defendants Williams, Yates, and Garofalo infringed on
18 Plaintiff’s right to be properly considered for parole by the Parole Board.

19 Additionally, to the extent that Plaintiff brings this claim against Defendants Masto,
20 Sandoval, and Cox, Plaintiff merely provides the minutes from the 2012 Prison Commissioners
21 Meeting indicating that Defendants Masto, Sandoval, and Cox were present. (2012 Prison
22 Comm’rs Meeting Mins. at 1). But for the same reasons provided in Part B.4 *supra*, the
23 minutes are insufficient to show that Defendants Masto, Sandoval, and Cox knew of any
24 alleged “computer glitch” causing false charges or convictions to appear in inmates’ parole
25 board reports or that Plaintiff’s 2013 and 2016 Parole Board Reports would subsequently be

1 affected by this alleged computer glitch. Thus, Plaintiff has failed to show that he is entitled to
2 summary judgment on his due process claim. Conversely, NDOC Defendants have
3 demonstrated that Plaintiff has failed to make a showing sufficient to establish a due process
4 claim. Accordingly, NDOC Defendants' Motion for Summary Judgment is granted as to this
5 claim.

6 **2. Plaintiff's claim against Parole Board Defendants**

7 This Court's February 25, 2019 Order permitted Plaintiff to proceed with his due
8 process claim for injunctive relief based on the Parole Board Defendants' alleged failure to
9 provide proper consideration for Plaintiff's parole. (Feb. 25, 2019 Order at 6, ECF No. 103). In
10 his Motion for Summary Judgment, Plaintiff details several errors which Plaintiff alleges the
11 Parole Board committed in considering Plaintiff for parole in 2013 and 2016. Plaintiff submits
12 that, under *Anselmo v. Bisbee*, 396 P.3d 848 (Nev. 2017), Plaintiff is entitled to a new parole
13 hearing.

14 In *Anselmo*, the Nevada Supreme Court held that "eligible Nevada inmates do have a
15 statutory right to be considered for parole by the Board. When the Board clearly misapplies its
16 own internal guidelines in assessing whether to grant parole, this court cannot say that the
17 inmate received the consideration to which they are statutorily entitled. Therefore, under the
18 limited circumstances presented in this case, we conclude that a new parole hearing is
19 warranted." *Anselmo*, 396 P.3d at 849. Notably, the plaintiff in *Anselmo* challenged the Parole
20 Board's application of factor NAC 213.518(2)(k), "nature of criminal record is increasingly
21 more serious." *Id.* at 852. As in Plaintiff's case, the internal guidelines for the Division of
22 Parole and Probation in *Anselmo* stated the following:

23 Indicate this factor if criminal conduct of the person has escalated over time to
24 include violence toward victims or others, or the scale of criminal activity has
25 increased over time. If the person is now serving a sentence of life, or
Murder/Sexual Assault, don't use this as the person has already committed the

1 most serious of crimes. This factor is used as a possible indicator of more serious
2 activity in the future.

3 *Id.*; (see also Guidelines at 64, Ex. C to Pl.’s MSJ, ECF No. 104). Thus, because the plaintiff in
4 *Anselmo* was serving a life sentence for murder, the Nevada Supreme Court found that “[b]ased
5 on the plain language of the internal guidelines, this aggravator should not have been applied to
6 [the plaintiff].” *Id.* at 852. The court then evaluated whether the Board’s error impacted the
7 plaintiff’s right to be considered for parole. *Id.* Relying on a South Carolina case, the court
8 indicated that “while the decision to grant or deny parole is not generally reviewable, the Board
9 is still obligated to act within established parameters.” *Id.* at 852–53. The court, therefore,
10 granted the plaintiff’s requested relief, and instructed the Board of Parole to vacate its earlier
11 denial of parole and conduct a new hearing in which the aggravating factor “nature of criminal
12 record is increasingly more serious” is not applied. *Id.* at 853.

13 Here, much like in *Anselmo*, the Parole Board applied factor NAC 213.518(2)(k),
14 “nature of criminal record is increasingly more serious,” to Plaintiff. However, the Board’s
15 internal guidelines provide that this factor should not be applied “[i]f the person is now serving
16 a sentence of life, or Murder/Sexual Assault[.]” Because Plaintiff’s sentence for sexual assault
17 was incarceration for life with the possibility of parole after 10 years, this would suggest that
18 under *Anselmo*, Plaintiff is entitled to injunctive relief in the form of a new parole hearing. Yet,
19 as the Parole Board Defendants argue, Plaintiff’s due process claim and Plaintiff’s requested
20 relief are now moot.

21 Parole Board Defendants explain that Plaintiff was heard by the Parole Board on
22 February 20, 2019. (2019 Parole Bd. Order and Risk Assessment, Ex. 1 to Parole Bd. MSJ,
23 ECF No. 114-1). Plaintiff was assessed as a moderate risk to reoffend. (*Id.*). The Board
24 therefore considered factors, including that the “NRS 213.1214 assessment result indicates an
25 above-average risk to reoffend,” the victim was 16 years old at the time of the offense, Plaintiff

1 had numerous prior property referrals as a juvenile, and Plaintiff has a prior referral for robbery
2 as a juvenile. (*Id.*). The Parole Board granted Plaintiff parole to his consecutive sentence. (*Id.*).

3 Courts have ruled that when a sentence is discharged, no effective relief may be granted,
4 and claims related to it are moot as there is “no statutory or case law exists in Nevada
5 permitting a grant of retroactive parole.” *Mack v. Nevens*, No. 2:15-cv-01728-RFB-GWF, 2018
6 WL 702887, at *4 (D. Nev. Feb. 2, 2018) (citing *Niergarth v. Warden*, 768 P.2d 882, 884 (Nev.
7 1989)); *see also Kille v. Cox*, No. 2:15-cv-00062-JCM-GWF, 2016 WL 1239253, at *3 (D.
8 Nev. Mar. 29, 2016) (“*Niergarth* held that parole cannot be granted retroactively in Nevada.”).

9 In *Niergarth*, the Nevada Supreme Court indicated that it was

10 unaware of any statutory or case-law authority for the proposition that the Parole
11 Board has authority to grant a retroactive parole. Assuming, however, that the
12 Parole Board has such authority, there appears to be no reason why the Parole
13 Board cannot take any appropriate action within its powers at the hearing
14 presently scheduled for June 1, 1989. Further, in light of the Parole Board’s
15 refusal to grant appellant a parole to the street, appellant cannot demonstrate that
16 his belief that the Parole Board might grant him a retroactive parole is anything
17 more than speculation.

18 *Niergarth*, 768 P.2d at 884. Because a parole hearing would be the only relief available and no
19 statutory authority or case law permits a retroactive grant of parole, Plaintiff’s claims
20 are moot. *Williams v. State Dep’t of Corr.*, 402 P.3d 1260, 1265 n.7 (Nev. 2017); *Almy v.*
21 *Dzurenda*, No. 3:17-cv-00045-MMD-WGC, 2019 WL 759281, at *4 (D. Nev. Jan. 18, 2019),
22 report and recommendation adopted, No. 3:17-cv-00045-MMD-WGC, 2019 WL 720979 (D.
23 Nev. Feb. 20, 2019).

24 Plaintiff disputes that his claim and requested relief are moot, arguing that he has merely
25 been “institutionally paroled” but that he has not actually been paroled because he is still “in
custody.” (Pl.’s Resp. NDOC MSJ at 16). To support his argument, Plaintiff cites several cases
for the proposition that “prisoners under consecutive state sentences should be treated as a
continuous stream series.” (*Id.*) (citing *Peyton v. Rowe*, 391 U.S. 54 (1968)). Plaintiff then

1 contends he is “still ‘in custody’ on his 10 to life [sentence] until all of his sentences are served.
2 He hasn’t expired his 10 to life sentence.” (*Id.*) However, the cases Plaintiff cites are ones
3 addressing habeas corpus petitions, not § 1983 claims. *See Peyton*, 391 U.S. at 54; *Garlotte v.*
4 *Fordice*, 515 U.S. 39, 40 (1995). Therefore, these cases are not applicable to Plaintiff’s action.
5 Moreover, Plaintiff argues that his claim is not moot because he “served 6 extra years on false
6 charges” and “this [violation] can still be corrected, in part by providing him with a re-hearing,
7 which is what he requested.” (Pl.’s Resp. NDOC MSJ at 16). However, “the Nevada statutory
8 scheme does not provide any due process right in the grant of parole.” *Anselmo v. Bisbee*, 396
9 P.3d at 851. And as discussed *supra*, there is no basis for Plaintiff’s assertion that Plaintiff
10 served additional time as a result of “false charges.” Additionally, while Plaintiff appears to
11 request a re-hearing so that he may obtain retroactive parole, no statutory authority or case law
12 permits a retroactive grant of parole in Nevada. Accordingly, Plaintiff’s due process claim for
13 injunctive relief against Parole Board Defendants is moot. Parole Board Defendants’ Motion
14 for Summary Judgment is granted as to this claim.

15 **E. Ex Post Facto Clause**

16 The States are prohibited from enacting an ex post facto law. U.S. Const., Art. I, § 10,
17 cl. 1. “One function of the Ex Post Facto Clause is to bar enactments which, by retroactive
18 operation, increase the punishment for a crime after its commission.” *Garner v. Jones*, 529 U.S.
19 244, 249 (2000). To fall within the ex post facto prohibition, a law must be retrospective,
20 which means that it must apply to events occurring before its enactment, and it must
21 disadvantage the offender affected by it. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997).
22 “Retroactive changes in laws governing parole of prisoners, in some instances, may be violative
23 of this precept.” *Garner*, 529 U.S. at 249.

24 The Supreme Court has not adopted “a single formula for identifying which legislative
25 adjustments, in matters bearing on parole, would survive an ex post facto challenge.” *Garner*,

1 529 U.S. at 252. Instead, “[t]he question is whether the amended [rule] creates a significant
2 risk of prolonging [the prisoner’s] incarceration,” and there is no constitutional violation where
3 the legislative change produces “only the most speculative and attenuated possibility of
4 producing the prohibited effect.” *Id.* at 251 (citing *California Dept. of Corrections v. Morales*,
5 514 U.S. 499, 509 (1995)). “[T]he focus of the ex post facto inquiry is not on whether a
6 legislative change produces some ambiguous sort of ‘disadvantage,’ nor . . . on whether an
7 amendment affects a prisoner’s opportunity to take advantage of provisions for early release.”
8 *Id.* at 506 n.3 (internal quotation marks omitted). “[T]he question of what legislative
9 adjustments will be held to be of sufficient moment . . . must be a matter of degree.” *Id.* at 509.

10 Here, Plaintiff argues that:

11 To apply the amended version of NRS 213.1214 [risk assessment] that became
12 effective [2015], would violate [the] Ex Post Facto Clause because they would be
13 apply[ing] an amended law retroactively to Plaintiff that works to disadvantage
14 him as it would make him a “high risk” to reoffend forever, . . . And as Plaintiff
15 stated before, if Plaintiff is a high risk to re-offend, then the parole board has to
16 deny his parole and because he has a life sentence, he has no expiration date so
the parole board is now required to deny his parole until he dies, which converts
his sentence from life with the possibility of parole into a life without the
possibility of parole.

17 (Pl.’s MSJ at 26–27); (*see also* FAC at 20–22, ECF No. 11). In other words, Plaintiff contends
18 that applying the 2015 version of risk assessment mandated by NRS 213.1214 has effectively
19 converted his sentence of life with the possibility of parole into a sentence of life *without* the
20 possibility of parole. However, the Order Granting Parole dated February 20, 2019, (Parole Bd.
21 Order and Risk Assessment), shows that Plaintiff’s “effective date of parole” is May 1, 2019.
22 Plaintiff acknowledges that he has been “‘institutionally paroled’ to his consecutive sentence.”
23 Thus, Plaintiff cannot show a violation of the ex post facto clause on this basis.

24 Moreover, as explained in the Court’s prior Order, (ECF No. 88), the NRS 213.1214 risk
25 assessment could not have altered Plaintiff’s life sentence. Plaintiff was convicted of sexual

1 assault under NRS 200.364 and 200.366 and sentenced to imprisonment in “state prison for life
2 with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years
3 has been served.” NRS 200.366; (FAC at 9). The sentencing court also issued Plaintiff a
4 consecutive sentence of eight to twenty years. (*Id.*). In determining retroactivity, the “critical
5 question is whether the [regulations] change[] the legal consequences of acts completed before
6 [the] effective date[of the regulations.]” *See Weaver v. Graham*, 450 U.S. 24, 31 (1981). Here,
7 NRS 213.1214 does not change the legal consequence of Plaintiff’s acts completed resulting in
8 his life conviction. Parole eligibility does not affect the length of a life prison term, and under
9 Nevada law, Plaintiff is not entitled to parole on a life sentence. *See Dunham v. Crawford*, 2008
10 WL 624444, at *9 (D. Nev. Mar. 4, 2008). As such, the Court grants NDOC Defendants’
11 Motion for Summary Judgment as to Plaintiff’s ex post facto claim.⁹

12 **F. Plaintiff’s Motion for Default Judgment, (ECF No. 121)**

13 Pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, “[w]hen a party against
14 whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and
15 that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Fed. R.
16 Civ. P. 55(a). Rule 55(b)(2) further provides that a court may enter a default judgment against
17 a defendant who has failed to appear. Fed. R. Civ. P. 55(b)(2). Whether to enter a default
18 judgment is a question within the discretion of the trial court. *See Aldabe v. Aldabe*, 616 F.2d
19 1089, 1092 (9th Cir. 1980).

20 Here, Plaintiff requests that “the court enter default judgment against defendants or to
21 grant his Motion for Summary Judgment against (NDOC Defendants) for not responding to
22 _____

23 ⁹ Plaintiff argues that he is entitled to attorney fees in relation to his summary judgment motion. (Pl.’s MSJ at
24 28). However, the Ninth Circuit has provided that in these circumstances attorney fees cannot be allowed.
25 *Gonzalez v. Kangas*, 814 F.2d 1411, 1411–12 (9th Cir. 1987). In denying a pro se party attorney fees, the court
reiterated that that “the existence of an attorney-client relationship” is a prerequisite to an award of attorney
fees.” *Id.* at 1412 (quoting *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974)). Indeed, it has long been
established that “pro se civil rights litigants are not entitled to attorneys fees under 42 U.S.C. § 1988.” *Ramirez v.*
Guinn, 271 F. App’x 574, 576 (9th Cir. 2008). Therefore, Plaintiff cannot obtain attorney fees in this case.

1 Plaintiff's Motion for Summary Judgment in 21 days." (Pl.'s Mot. Default J., ECF No. 121).
2 Plaintiff notes that the 21-day deadline fell on March 28, 2019. (*Id.*). However, on March 27,
3 2019, NDOC Defendants joined in the Parole Board Defendants' Response to Plaintiff's
4 Motion for Summary Judgment. (NDOC Defs.' Joinder, ECF No. 116). Plaintiff presents no
5 argument that NDOC Defendants responding by way of joinder is inappropriate. Accordingly,
6 Plaintiff's Motion for Default Judgment, (ECF No. 121), is denied.

7 **G. Plaintiff's Motions to Strike, (ECF Nos. 144, 148)**

8 Plaintiff's identical Motions to Strike, (ECF Nos. 144, 148), argue that the portion of
9 NDOC Defendants' Motion for Summary Judgment addressing Plaintiff's "parole board
10 claims" should be stricken. Plaintiff's Motions are based on Rule 12(f), which provides that
11 "the court may strike from a pleading an insufficient defense or any redundant, immaterial,
12 impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Plaintiff argues that NDOC
13 Defendants' Motion for Summary Judgment is redundant because "they have another or a
14 separate motion pending ruling . . . that was filed via joinder on March 27, 2019." (Pl.'s Mots.
15 Strike at 2, ECF Nos. 144, 148). "Thus the defendants cannot have 2 separate motions for
16 summary judgment, pending on the same claim, for same defendants, with separate
17 arguments." (*Id.*). However, as NDOC Defendants explain, Rule 12(f) applies to pleadings and
18 does not apply to summary judgment motions. (NDOC Defs. Resp Mot. Strike, ECF No. 147).
19 Moreover, Plaintiff fails to provide any additional legal authority supporting his Motion. As
20 such, Plaintiff has failed to show that the Court should apply Rule 12(f) to NDOC Defendants'
21 Motion for Summary Judgment. Accordingly, Plaintiff's Motions to Strike are denied.¹⁰

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24
25 ¹⁰ In light of the instant Order addressing the parties' motions for summary judgment, Plaintiff's Motion for
Hearing on Dispositive Motion, (ECF No. 130), and Plaintiff's Motions for Status Check, (ECF Nos. 150, 181),
are denied as moot.

1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Partial Summary Judgment,
3 (ECF No. 104), is **DENIED**.

4 **IT IS FURTHER ORDERED** that Parole Board Defendants' Motion for Summary
5 Judgment, (ECF No. 114), is **GRANTED**.

6 **IT IS FURTHER ORDERED** that NDOC Defendants' Motion for Summary
7 Judgment, (ECF No. 135), is **GRANTED in part and DENIED in part**. The Motion is
8 denied as to the First Amendment retaliation claim asserted against Defendant Williams for
9 retaliatory threats. The Motion is granted in all other respects.

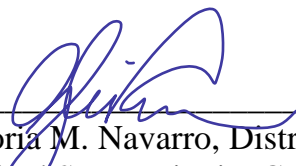
10 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Default Judgment, (ECF No.
11 121), is **DENIED**.

12 **IT IS FURTHER ORDERED** that Plaintiff's Motions to Strike, (ECF Nos. 144, 148),
13 are **DENIED**.

14 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Hearing on Dispositive
15 Motion, (ECF No. 130), and Plaintiff's Motions for Status Check, (ECF Nos. 150, 181), are
16 **DENIED as moot**.

17 **IT IS FURTHER ORDERED** that the parties shall have 30 days from the date of this
18 Order to submit a joint pretrial order.

19 **DATED** this 11 day of March, 2020.

20
21 
22 _____
23 Gloria M. Navarro, District Judge
24 United States District Court
25